

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)	
)	
PACIFICORP'S JIM BRIDGER)	PETITION NO. VIII-00-1
AND NAUGHTON)	
ELECTRIC UTILITY STEAM)	ORDER RESPONDING TO
GENERATING PLANTS)	PETITIONER'S REQUEST THAT
)	THE ADMINISTRATOR OBJECT
Permit Nos. 30-120)	TO ISSUANCE OF STATE
30-121)	TITLE V OPERATING PERMITS
_____)	

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING
PETITION FOR OBJECTION TO PERMITS

On June 30, 1998, the Wyoming Outdoor Council (WOC or the Petitioner) petitioned the United States Environmental Protection Agency (EPA or the Agency) to object to the issuance of two proposed operating permits to PacifiCorp pursuant to Title V of the Clean Air Act (Act), 42 U.S.C. §§ 7661-7661f. On April 10, 1998, the Wyoming Department of Environmental Quality (WDEQ) issued the permits to PacifiCorp for the operation of two coal-fired electric utility steam generating plants, the Jim Bridger Plant and the Naughton Plant. The permits constitute a State operating permit pursuant to Wyoming implementing regulations, section 30 of the Wyoming Air Quality Standards and Regulations (WAQSR), Title V of the Act, and the federal implementing regulations at 40 C.F.R. Part 70.

The petition challenges two provisions in each of the PacifiCorp operating permits. The first objection is that the

permits fail to require continuous opacity monitoring systems (COMS) on Naughton unit 3 and Jim Bridger units 1, 2, and 3. Alternatively, if PacifiCorp makes a valid demonstration that COMS are not technically feasible for the listed units, the petition alleges that an alternative method of determining compliance should be required.

The second objection is that the permits impermissibly exempt excess emissions from state implementation plan (SIP) emission limitations during equipment malfunctions and other conditions. For these reasons, the Petitioner has requested that EPA object to the issuance of the PacifiCorp permits for the Jim Bridger and Naughton Plants pursuant to Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2).

Based on a review of all the information before me, including the PacifiCorp permits, the permit applications and statements of basis, additional information provided by WDEQ, and the information provided by the Petitioner in the petition, I grant the Petitioner's request in part and deny the remainder of the request.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to EPA an operating permit program intended to meet the requirements of Title V of

the Act. The State of Wyoming submitted a Title V program governing the issuance of operating permits on November 19, 1993. In January 1995, EPA granted interim approval of the Wyoming Title V program, which became effective on February 21, 1995. See 64 *Fed. Reg.* 3766 (Jan. 19, 1995); 40 C.F.R. Part 70, Appendix A. In February 1999, EPA granted the State of Wyoming full approval of its Title V program, with such approval becoming effective on April 23, 1999. See 60 *Fed. Reg.* 8523 (Feb. 22, 1999). Major stationary sources of air pollution and other sources subject to Title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with all applicable requirements of the Act. 42 U.S.C. §§ 7661a(a) & 7661c(a).

Under Section 505(b) of the Act (42 U.S.C. § 7661d(b)) and 40 C.F.R. § 70.8(c), the Administrator is authorized to review state operating permits issued pursuant to Title V and to object to permits that fail to comply with the applicable requirements of the Act or the requirements of Part 70. In particular, under Section 505(b)(1) of the Act, EPA is to object to the issuance of a proposed Title V permit if the Agency determines that the permit is "not in compliance with the applicable requirements of this Act, including the requirements of an applicable implementation plan." 42 U.S.C. § 7661d(b). "Applicable

requirements," defined in 40 C.F.R. § 70.2, include: ". . . (5) Any standard or other requirement of the acid rain program under Title IV of the Act or the regulations promulgated thereunder." The corresponding state regulation, section 30(b)(v) of the WAQSR, also defines "applicable requirements" to include "any standard or other requirement" under Title IV of the Clean Air Act.

When EPA does not object to a Title V permit on its own initiative, Section 505(b)(2) of the Act provides that any person may petition the Administrator to object to the permit. See 42 U.S.C. § 7661d(b)(2); see also 40 C.F.R. § 70.8(d). To justify exercise of an objection by EPA to a Title V permit pursuant to Section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with applicable requirements of the Act, including the requirements of Part 70. *Id.* at § 70.8(d). Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period.¹ A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in

¹ See 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Petitioner satisfied the threshold requirement to have commented during the public comment period on concerns with the draft operating permits that are the basis for this petition. See letters from Reed Zars, member of WOC, to Dan Olson, WDEQ, dated February 13 and February 27, 1998, attached to the WOC petition.

response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such permit consistent with the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. BACKGROUND

PacifiCorp submitted a Title V application for the Jim Bridger Plant to the WDEQ on November 13, 1995 for the operation of a steam electric generating facility. The Phase II NO_x compliance plan required by Title IV of the Act for this facility was submitted on November 13, 1997. PacifiCorp submitted a Title V application for the Naughton plant to the WDEQ on November 10, 1995 for the operation of a steam electric generating facility. The Phase II NO_x compliance plan for the Naughton facility was submitted on November 13, 1997.

WDEQ provided notice and an opportunity for public comment on draft Title V permits for the Jim Bridger Plant on January 16, 1998 and for the Naughton Plant on January 23, 1998. WDEQ also submitted the draft permits to EPA for review and comment. EPA's Region VIII commented on the draft Title V permits in a letter to WDEQ dated February 9, 1998. The Region's comments pertained to various requirements under the acid rain program, but did not address opacity monitoring.

WDEQ received comments from Petitioner during the public comment periods for both of the PacifiCorp draft permits. The WOC submitted comments on the draft permit for the Jim Bridger Plant in a letter dated February 17, 1998 and for the Naughton Plant in a letter dated February 23, 1998. For each permit, the WOC commented on permit conditions addressing COMS and equipment malfunctions. WDEQ responded to each of the comments made by WOC in letters dated February 25, 1998 and March 5, 1998. WDEQ received no requests for a public hearing.

EPA Region VIII received proposed permits for both PacifiCorp plants on March 20, 1998, for EPA's 45-day review period under Section 505(b)(1) of the Act. 42 U.S.C. § 7661d(b)(1). The proposed permits addressed the comments submitted by Region VIII on the earlier draft permits. Region VIII submitted no additional comments on the proposed permits. On April 10, 1998, WDEQ issued final Title V operating permits to PacifiCorp for its Jim Bridger and Naughton power plants. WOC submitted its petition for EPA objection on June 30, 1998.

III. ISSUES RAISED BY THE PETITIONER

Petitioner challenges two provisions in the final PacifiCorp operating permits. The first objection is that the permits fail to require COMS for Naughton unit 3, a coal-fired steam generator (boiler) with a heat input greater than 250 million BTU per hour,

and Jim Bridger units 1, 2, and 3, each of which is a coal-fired steam generator (boiler) with heat input greater than 250 million BTU per hour.² Alternatively, if PacifiCorp makes a valid demonstration that COMS are not technically feasible for these units, Petitioner alleges that an alternative method of monitoring compliance should be required. Petition at 3. The second objection is that the permits allow excess emissions to be exempted from SIP emission limits during equipment malfunctions and other conditions. *Id.* For the reasons set forth below, I grant the petition on the basis of the first objection and deny Petitioner's second objection.

A. Issue Warranting Partial Grant of the Petition

Petitioner alleges that monitoring compliance by Jim Bridger units 1, 2, and 3 and Naughton unit 3 with the 20 percent opacity limit for new sources, established in section 14(a) of the WAQSR, must be conducted using a COMS, not quarterly Method 9 readings.³ The acid rain program of Title IV of the Act generally requires

² See Letter from Dan Heilig, Associate Director, WOC, to Carol Browner, Administrator, U.S. EPA (June 30, 1998), at 1 (Petition).

³ Method 9, Visual Determination of the Opacity of Emissions from Stationary Sources, is found in 40 C.F.R. Part 60 (New Source Performance Standards), Appendix A (Test Methods). Using Method 9, qualified observers who have been certified by EPA or a state determine the opacity of a plume of smoke as it is emitted from a stack or vent at a stationary source. The opacity of the plume is the degree to which the passage of light is obstructed by the smoke and is measured in terms of percentage of light obstructed. The observer takes readings every 15 seconds over a period of 6 minutes and then calculates an average opacity reading for the period. A COMS is an automated system of monitoring opacity of a plume of smoke by use of monitoring devices located within the stack. Readings are made continuously and recorded on strip charts.

the use of COMS for all affected coal-fired units. See 40 C.F.R. § 75.14(a). The Wyoming SIP requires continuous monitoring for opacity for solid fossil fuel-fired steam generators with a heat input greater than 250 million BTU per hour. See WAQSR § 23(a). Both the federal acid rain requirement and the SIP requirement apply to the units in question.

Petitioner claims that WDEQ inappropriately exempted the PacifiCorp units listed above from the applicable opacity monitoring requirements of the federal acid rain program and the Wyoming SIP. Petition at 2. Section 23(b) of the WAQSR allows for an exemption from the continuous opacity monitoring required by the SIP, if the stack gas contains uncombined water vapor. The federal acid rain program also allows for an exemption from its continuous opacity monitoring requirement, if the unit has a wet flue gas pollution control system for sulfur dioxide or particulates and the owner or operator can demonstrate that condensed water is present in the exhaust gas stream and impedes the accuracy of the opacity readings. See 40 C.F.R. § 75.14(b).

In a February 26, 1998 letter to WDEQ, PacifiCorp stated that its Naughton unit 3 was exempt from opacity monitoring requirements pursuant to 40 C.F.R. § 75.14(b). PacifiCorp made this claim because it had installed a wet flue gas desulfurization scrubber on unit 3 in 1982. PacifiCorp alleged that flue gas temperatures after the scrubber are in the range of

120 to 130 degrees Fahrenheit and result in saturated conditions. PacifiCorp made the same claim for Jim Bridger units 1, 2, and 3 in a March 3, 1998 letter to WDEQ. The scrubbers for units 1, 2, and 3 commenced operation in May 1990, June 1986, and September 1988, respectively. PacifiCorp claimed that the wet scrubbers installed at Jim Bridger cause saturated conditions in each of the three stacks and that these saturated conditions impede the accuracy of opacity readings on the stack.

In a letter dated March 3, 1998, WDEQ purported to exempt PacifiCorp's Naughton unit 3 from continuous opacity monitoring due to the saturated conditions in the stack. WDEQ referenced both section 23(b) of the WAQSR and 40 C.F.R. § 75.14(b) as the regulatory bases for granting the exemptions. In a letter dated March 6, 1998, WDEQ also claimed to be exempting PacifiCorp's Jim Bridger units 1, 2, and 3 from continuous opacity monitoring. This letter also indicated that the exemptions were based on saturated conditions in each of the stacks. In this case, however, WDEQ referenced only 40 C.F.R. § 75.14(b) as the regulatory basis for exempting the Jim Bridger units and not the exemption allowed under section 23(b) of the WAQSR.

EPA agrees with Petitioner that the final Title V operating permits for the Naughton and Jim Bridger plants inappropriately fail to impose the continuous opacity monitoring required by EPA's acid rain regulations on the four units in question. These omissions of applicable requirements from the final permits

appear to be based on WDEQ's incorrect claim of authority to exempt these units from EPA's acid rain regulations. Even though WDEQ has the authority to exempt the units from the continuous opacity monitoring requirements under its own regulations,⁴ EPA has not delegated to any state permitting authority, including WDEQ, authority under the acid rain program to grant exemptions from monitoring requirements under Part 75 of the acid rain regulations, including exemptions from the federal continuous opacity monitoring requirement under 40 C.F.R. § 75.14(b).

Part 75 requires that owners or operators obtain exemptions from Part 75 monitoring requirements from the Administrator. Although section 75.14(b) does not explicitly require submission of a petition to the Administrator in order to make the necessary demonstrations and obtain an exemption from continuous opacity monitoring requirement, section 75.66(a) and (i) establish general procedures for submitting requests to the Administrator for approval of alternative requirements under Part 75. This process has been clarified by recent rulemaking. See 63 *Fed. Reg.* 28032, 28048-49 (May 21, 1998) (proposed acid rain

⁴ While the March 6, 1998 letter from WDEQ to PacifiCorp concerning the Jim Bridger facility does not clearly indicate that units 1, 2, and 3 are being exempted from continuous opacity monitoring under section 23 (b) of the WAQSR, the final Title V permit conditions for these units are consistent with such a determination. Because the final Title V permit does not impose continuous opacity monitoring on units 1, 2, and 3 pursuant to section 23(a), and because granting exemptions from such monitoring is properly within the State's authority under the SIP, EPA concludes, absent further evidence to the contrary, that WDEQ has exempted these units from continuous opacity monitoring under the authority of section 23(b).

regulations explaining that section 75.66 provides general authority and procedures for submission of petitions to the Administrator for approval of alternatives to Part 75 requirements, regardless of whether a specific Part 75 provision provides for such petitions). *See also* 64 *Fed. Reg.* 28564, 28623 (May 26, 1999) (adopting the proposal). Because section 75.66 does not provide for submission of such petitions to any other agency such as, for example, to any state permitting authority, the authority to rule on such petitions remains with EPA. The Administrator has delegated her authority to grant or deny Part 75 monitoring exemptions to the Clean Air Markets Division (formerly the Acid Rain Division) within the Office of Air and Radiation.

In addition, while the Administrator may delegate to state permitting authorities certain aspects of the acid rain program, primarily the administration and enforcement of acid rain permits, such delegation does not include the granting of petitions for exemptions to Part 75 requirements. Under section 72.73(a), the Administrator may delegate the administration and enforcement of acid rain permits, if the Administrator finds that the state permitting authority's acid rain program meets certain EPA requirements. However, acid rain permits require owners or operators to comply with the requirements of Part 75 and do not generally provide exemptions from monitoring requirements. Nor

does the delegation provision of section 72.73(a) provide that delegated state permitting authorities may grant exemptions from permit requirements.⁵ See 40 C.F.R. § 72.9(b) (listing the standard requirements included in acid rain permits) and 63 *Fed. Reg.* 28053, *supra* (distinguishing between delegation of permitting authority and authority to grant petitions under section 75.66).

For these reasons, EPA interprets section 75.14(b) to require the owner or operator of a unit to petition the Administrator to obtain an exemption from continuous opacity monitoring under section 75.14(a).

PacifiCorp did petition EPA Region VIII for a waiver of the continuous opacity monitoring requirements for Jim Bridger units 1, 2, and 3, in a letter dated December 5, 1995. The request was based on a claim that the stacks are operating at saturated conditions, because they are located downstream from flue gas desulfurization equipment. As a result of administrative error, however, EPA did not respond to Pacificorp's December 5, 1995 petition. EPA notes that the company's petition did not expressly address whether the condensed water in the stacks would

⁵ The only exceptions to this rule are the retired units and new units exemptions, which a state permitting authority may incorporate in an acid rain permit. Under these exemptions, a unit that is permanently retired, or a clean new unit with a name-plate capacity of 25 megawatts or less, is exempt from virtually all acid rain program requirements, including monitoring requirements. See 40 C.F.R. §§ 72.7 & 72.8. Neither the retired units exemption nor the new units exemption is applicable to the units at issue in this case.

impede the accuracy of continuous opacity monitor readings, which is one of the criteria for granting an exemption under 40 C.F.R. § 75.14(b).

The regulations have no provision for automatic approval of an exemption, if the Agency fails to act on a petition. See 40 C.F.R. §§ 75.14(b), 75.66(a) & (i). As with other regulatory exemptions, the burden of justifying the exemption lies with the party seeking or invoking it. See, e.g., *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 289 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (placing the burden of proof for exemptions on the requestor); see also *United States v. Eastern of New Jersey, Inc.*, 770 F.Supp. 964, 978 (D.N.J., 1991). With regard to the Jim Bridger units, EPA has not approved or otherwise acted upon PacifiCorp's petition or otherwise granted an exemption from the federal acid rain continuous opacity monitoring requirements, and does not do so here. With regard to Naughton unit 3, PacifiCorp never submitted a petition to EPA and thus EPA has not granted or denied an exemption from the federal acid rain continuous opacity monitoring requirements.

For the reasons discussed above, Petitioner's first claim demonstrates that the two PacifiCorp Title V permits fail to assure compliance with the requirements of the Act in two respects.

The first deficiency is straightforward: the permit fails

to assure compliance with the opacity monitoring requirements of Title IV of the Act. The permits must be revised to require continuous opacity monitoring on Jim Bridger units 1, 2, and 3 and on Naughton unit 3 in the absence of an exemption.

PacifiCorp may still petition EPA to exempt Naughton Unit 3 from the continuous monitoring requirements and provide additional support for the petition for exemption for Jim Bridger units 1, 2, and 3. The EPA intends to act expeditiously on any such submissions by PacifiCorp, which should be directed to the Clean Air Markets Division. The exemption petitions and support submitted by PacifiCorp must demonstrate that each unit has a wet flue gas pollution control system, that condensed water is present in each unit's flue gas, and that the saturated conditions would impede the accuracy of opacity measurements for each unit. See 40 C.F.R. § 75.14(b). If PacifiCorp makes such demonstrations and EPA grants the exemptions prior to completion of the permit reopening proceedings, then the Title V permits would not need to be revised to incorporate continuous opacity monitoring devices for purposes of the acid rain program requirements. In the meantime, however, WDEQ should proceed to reopen each permit, in accordance with 40 C.F.R. § 70.8 and section 30(d)(vii) of the WAQSR, to require continuous opacity monitoring for the relevant Naughton and Jim Bridger units, including a compliance schedule, as necessary, to bring these

units into compliance with the applicable requirement of 40 C.F.R. § 75.14(a). See 40 C.F.R. § 70.6.

The second deficiency may be simply stated as well: the permit fails to assure compliance with the SIP opacity limit in section 14(a) of the WAQSR. The explanation of this deficiency is more complex, however. Section 114(a)(3) of the Clean Air Act requires "enhanced monitoring" at all major stationary sources. Section 504(c) requires each Title V operating permit to "set forth . . . monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." Section 504(a) requires permits to include "such other conditions as are necessary to assure compliance with applicable requirements" of the Act. These statutory requirements are implemented by corresponding EPA regulations. In particular, 40 C.F.R. §70.6(a)(3)(i)(B) provides that where the applicable requirement does not require periodic testing or monitoring, the permit shall contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit...." In addition, § 70.6(c)(1) requires that "[all part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and

conditions of the permit."

Recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, over the last year, the court has addressed EPA's compliance assurance monitoring ("CAM") rulemaking (62 *Fed. Reg.* 54940 (1997)) (promulgating, *inter alia*, 40 C.F.R. Part 64) in *Natural Resources Defense Council v. EPA*, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA's periodic monitoring guidance under Title V in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). In *Natural Resources Defense Council*, NRDC argued that CAM was inadequate to meet the statutory mandate that all major sources be subject to enhanced monitoring because it excluded units without control devices, units below a 100-ton cutoff, and certain other categories. 194 F.3d at 135.⁶ The court disagreed, and upheld the CAM rule and EPA's general enhanced monitoring program. 194 F.3d at 135-37. The court pointed out that some sources exempt from CAM were subject to "other specific rules." *Id.*⁷ The court then reasoned that all remaining major sources were subject to one of two "residual rules" under Part 70, either the periodic monitoring rule, at 40 C.F.R. §

⁶ For example, CAM exempts acid rain program requirements under Title IV of the Act. See 40 C.F.R. § 64.2(b)(1)(iv).

⁷ For example, acid rain sources exempt from CAM (*see supra* n. 6) are subject to state-of-the-art monitoring under CAA section 412 and 40 C.F.R. Part 75.

70.6(a)(3)(i)(B), or the sufficiency rule at § 70.6(c)(1). *Id.* at 135-36. The court recognized that "[w]hile the Part 70 rules are not as specific as CAM, they have the same bottom line - a major source must undertake 'monitoring ... sufficient to assure compliance.'" *Id.* at 136.⁸

In *Appalachian Power Co. v. EPA*, a different panel of the D.C. Circuit set aside EPA's "Periodic Monitoring Guidance"⁹ after finding that it had in effect amended part 70's periodic monitoring rule at 40 C.F.R. § 70.6(a)(3)(i)(B) by interpreting that rule too broadly to cover situations where the underlying applicable requirement called for some kind of "periodic" testing or monitoring, but such monitoring was not sufficient to assure

⁸ The entire relevant passage reads as follows:

Specifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules, and if they are not, they are subject to the following two residual rules: (1) "[The permit shall contain] periodic monitoring sufficient to yield reliable data ... that are representative of the source's compliance with the permit...." 40 C.F.R. 70.6(a)(3)(i)(B); (2) "All part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." *Id.* § 70.6(c)(1).

While the Part 70 rules are not as specific as CAM, they have the same bottom line - a major source must undertake "monitoring ... sufficient to assure compliance." Like CAM, the monitoring protocols will be developed on a unit-by-unit basis. Such monitoring is sufficiently "enhanced" over the pre-1990 situation to satisfy the statutory requirement. See Compliance Assurance Monitoring, 62 Fed. Reg. 54,900, 54,904 (1997).
Id.

⁹ "Periodic Monitoring Guidance," signed by Eric V. Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards, September 15, 1998.

compliance. 208 F.3d at 1028. The *Appalachian Power* court held that, in its current form, the periodic monitoring rule authorized sufficiency reviews of monitoring and testing in an existing emissions standard, and enhancement of that monitoring or testing through the permit, only when that standard "requires no periodic testing, specifies no frequency, or requires only a one-time test." *Id.* The panel did not address the separate "sufficiency" requirement of § 70.6(c)(1) or the earlier decision in *Natural Resources Defense Council*, except to note that it disagreed with EPA's argument that the court in the earlier decision read the periodic monitoring rule in the same way as did EPA. *Id.* at 1028 n. 27. Thus, the Clean Air Act requirements that each Title V permit have enhanced monitoring, and monitoring that is sufficient to assure compliance with the permit terms and conditions remain in place.

In accordance with these judicial precedents, where the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." See 40 C.F.R. § 70.6(a)(3)(i)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental

monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases, the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit as necessary to be sufficient to assure compliance with the terms and conditions of the permit.

In the present case, the underlying applicable opacity requirement in WAQSR § 14(a) provides for quarterly Method 9 visual readings. This monitoring requirement is "periodic" in nature. Thus, in accordance with the decision in *Appalachian Power* discussed above, until such time as EPA revises its regulations, the provisions of 40 C.F.R. § 70.6(a)(3)(i)(B) do not apply. However, I find that such infrequent monitoring at a coal-fired power plant is not sufficient to "assure compliance" with the 20% opacity limit in the Wyoming SIP within the meaning of § 70.6(c)(1) and sections 504(a) and 504(c) of the Clean Air Act, and does not constitute enhanced monitoring within the meaning of section 114(a)(3) of the Act. These monitoring requirements would be satisfied if PacifiCorp is not granted an exemption from the acid rain monitoring requirements in 40 C.F.R.

§ 75.14(a), continuous opacity monitors are installed, and, upon reopening of the permit, the permit is revised to provide that such monitoring will be used in monitoring compliance with the SIP opacity limit. If instead Pacificorp is granted an exemption from the acid rain monitoring requirements in 40 C.F.R. § 75.14(a), then the State (or EPA, if EPA issues the permit) must consider other appropriate monitoring alternatives for purposes of enhanced monitoring and assuring compliance with the SIP opacity limit, and must incorporate into the reissued permit such monitoring requirements as result from that analysis.

B. Issue Warranting Partial Denial of the Petition

Petitioner also requests that EPA object to the proposed PacifiCorp Title V operating permits on the basis that they allow improper exemptions from SIP emission limits. Petitioner asserts that the malfunction provision found in a general permit condition (G21) of both permits is inconsistent with EPA policy and should not be included in the permits. Petition at 3. Permit condition G21 states, "Emissions in excess of established regulation limits as a direct result of malfunction or abnormal conditions or breakdown of a process, control or related operating equipment beyond the control of the person or firm owning or operating such equipment shall not be deemed to be in violation of such regulations, if the Division is advised of the circumstances within 24 hours of such malfunction and a

corrective program acceptable to the Division is furnished." Petitioner maintains that this language provides an automatic exemption from applicable SIP emission limits. *Id.* Petitioner asserts that automatic exemptions from emission limitations are prohibited by EPA policy and that violations of emission limits are to be excused only for truly "unavoidable" events, not simply for events "beyond the control of the operator." *Id.* In support of these assertions, Petitioner cites EPA policy memoranda on "Continuous Compliance" (dated June 21, 1982) and the "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (dated February 15, 1983).¹⁰

Petitioner claims that the permit condition at issue does not require PacifiCorp to demonstrate that excess emissions are unavoidable nor does it specify that only unavoidable events beyond the control of PacifiCorp would be allowed a discretionary exemption from liability. Petition at 3. According to Petitioner, EPA policy requires that the burden of establishing that excess emissions were unavoidable must be placed on the owner or operator of a source before it can qualify for exercise of enforcement discretion. See Bennett Memo II ("Policy on

¹⁰ Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Directors of Air and Waste Management Divisions and Air Divisions, Regions I-X, titled "Definition of 'Continuous Compliance' and Enforcement of O&M Violations," dated June 21, 1982 (Bennett Memo I); and memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo II).

Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions”), Attachment, at 2. Petitioner asserts that the permit condition at issue does not impose such a burden on PacifiCorp. *Id.* In addition, Petitioner asserts that the decision to grant an exemption must be left to the discretion of an appropriate state administrative or judicial officer, not the WDEQ. *Id.*

The general permit condition for malfunctions, found in these and other operating permits issued by WDEQ, has been taken directly from an EPA-approved Wyoming SIP provision (section 19 of the WAQSR, titled “Abnormal conditions and equipment malfunction”). EPA agrees with Petitioner that the Act, as interpreted in EPA policy, does not allow for automatic exemptions from compliance for periods of excess emissions and that improper operation and maintenance practices do not qualify as malfunctions under EPA policy. See Bennett Memo I (“Definition of ‘Continuous Compliance’ and Enforcement of O&M Violations”) at 2; Bennett Memo II, Attachment at 1. EPA also agrees that SIPs should provide that the burden of proof is on the owner or operator of a source to demonstrate that excess emissions are a result of unavoidable events beyond the owner’s or operator’s control, for purposes of enforcement discretion or an affirmative defense before a neutral trier of fact in an enforcement action. See Bennett Memo II, Attachment at 2. See

also Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999, Attachment, p.3. To the extent that a malfunction provision broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved state implementation plan. *Id.* at 3.

Whether the provision in question meets any of these criteria is a matter of debate. WDEQ's response to comment letters to the WOC on the draft title V permit for the Jim Bridger Plant (letter from Dan Olson, Administrator, Air Quality Division, WDEQ, dated February 25, 1998) and on the draft title V permit for the Naughton Plant (letter from Dan Olson, WDEQ, dated March 5, 1998), as well as past enforcement actions taken by the WDEQ, demonstrate to EPA that the WDEQ's interpretation and application of section 19 may be consistent with the Act, as interpreted by EPA in its guidance. However, even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the "applicable requirement" as that term is defined in

40 C.F.R. § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a Title V permit, ignore or revise duly approved SIP provisions. (It should be noted that the provision cannot serve to excuse sources from compliance with requirements that are not derived from the SIP, such as, for example, the Title IV acid rain requirements.)

For the reasons discussed above, Petitioner's second claim does not demonstrate that the PacifiCorp operating permits fail to comply with the requirements of the approved operating permit program. Nonetheless, I am directing the regional office to review the Wyoming SIP to determine whether section 19 of the WAQSR, titled "Abnormal conditions and equipment malfunction," is consistent with the requirements of title I of the Clean Air Act, and to work with the State to ensure that any corrections, if necessary, are made.

IV. CONCLUSION

For the reasons set forth above, I partially grant the June 30, 1998 petition from the Wyoming Outdoor Council, requesting that the Agency object to two PacifiCorp permits for its Jim Bridger and Naughton coal-fired power plants, and I hereby object to the PacifiCorp Jim Bridger Plant permit and the PacifiCorp Naughton Plant permit based on the issue identified in Section III.A. above. I deny the remainder of the June 30 petition from

the Wyoming Outdoor Council.

Pursuant to Sections 505(b) and 505(e) of the Clean Air Act (42 U.S.C. §§ 7661d(b) and (e)) and 40 C.F.R. §§ 70.7(g) and 70.8(d), the WDEQ shall have 90 days from receipt of this Order to resolve the objection identified in Section III.A. above, and to submit a proposed determination of termination, modification, or revocation and reissuance of the PacifiCorp permits in accordance with this objection.

Date: November 16, 2000

Carol M. Browner
Administrator